

restoration. The function of 175 members performing a dig up is the same as that now being performed by the 1010 dig up crews.

Local 175 crews were always doing the dig ups, ie., the removal of the asphalt known as “cold patch” which was temporarily placed on top of a hole or trench by the Utility and the removal of the dirt and minor concrete resulting from the cut back; out of the hole or trench using a backhoe, jackhammer, shovels, and picks for as long as they have been performed at NYP (until April 1, 2017). Historically 175 members exclusively performed the dig ups, not 1010 members at NYP. (Tr. p. 56, 70, 114-115, 225, 326-329, 358-360, 398, 577-580, 648, 654)

Now, the dig up work is 100% being assigned to 1010 members.¹⁰ The dig up crew now works in tandem with workers performing a concrete pour, (instead of workers who placed asphalt into the dug out hole), with the usual asphalt paving crew coming later to place binder in the hole and to finish restoration of the road. As noted in testimony, the dig up crew, along with workers who would pour the concrete assemble at the first location of the day. Once the first dig up is accomplished, the workers separate; with the dig up crew moving forward while 2 workers remain behind to perform the concrete pour into the hole. (Tr. p. 78, 309, 365,

¹⁰ One curiosity is the testimony of Pasquale Labate who testified that prior to April 1, 2017 all the dig-ups had asphalt placed in them; and afterward, now, between 10-15% of the dig ups being performed still have binder asphalt placed into them; yet all the dig-up work has been given to 1010 members. This statement contradicts NYP's concept that the work goes to the union having jurisdiction over the material that goes into the hole. (Tr. p. 56-57). This is further proof that NYP is attempting to cut 175 members out of the work they always performed. (See, Tr.p.115)

524, 656) Once that first hole is dug up, and the crew separates, the workers pouring concrete in the holes follow the dig-up crews.¹¹ (Tr. p. 365)

Saw Cutting of Cut Back In Street: Saw Cut teams work independently of other road restoration crews. (Tr. P. 295, 515, 669, 712-714) They set up and remove their own barricades. (Tr. P. 303) Their work is usually performed days or weeks before a dig up crew comes upon the scene. (Tr. P. 302) Historically, up until about 2011-12, there was an equal amount of saw cutting and the saw cutting crews were mixed crews comprised of 175 and 1010 members. (Tr. P. 136 195 314-316, 333-334, 348, 669) The mixed saw cut crew would cut sidewalks and the street when necessary. (Id.) Somewhere in 2011-2012 the City changed regulations to permit “one step paving” which eliminated almost all of the asphalt saw cutting. (Tr. P. 137) And that is when, after a discussion with Local 175’s representative, 175 members were removed from the saw cutting crew as almost 99% of it was then done on sidewalks. (137, 139-140, 498)

However, with the new City regulations requiring cut backs of holes or trenches, and **there being thousands of them a week**, (Tr. P. 578-579, 611) the amount of street saw cutting has exploded, amounting now to at least

¹¹ This is similar to what happened prior to April 1, 2017 when the dig up crew would gather at the first location, the backhoe operator and jackhammer worker would break up the cold patch and dig out the hole and move to the next hole; while the remainder of the crew would stay and place asphalt into the hole and finish pave. (Tr. p.360) This is also similar to how a concrete sidewalk crew would operate when workers first jackhammered or cut the sidewalk, remove the debris and moved on; while the other half of the crew would follow and pour the concrete. (Tr. p. 496).

15% of the saw cutting and rising daily; warranting a return to the historic mixed saw cut crew. (Tr. P. 135) The increase in “dig ups” which now requires a saw cut for each dig up means there is lots of street cuts being made. And the saw cut crew often is now comprised of four (4) men, not two (2) as before. (See Tr. P. 168, 671-672, 669)

Local 175’s position is clear—175 members should at the very least be sharing, if not doing, all of the new street saw cutting work as it is being performed in the asphalt street; that saw cutting of asphalt is within its Certification; that sharing the work is the most equitable way of doing it to provide flexibility for the crew to also be assigned the cutting of concrete sidewalks and curbs; and historically that is how it was done when there was saw cutting in the street.

The fact that since 2011-12 there has been little or no saw cutting in the street for 175 members does not undercut 175’s right to the work when it does arise. From an economic perspective it makes no difference which union members are assigned to a saw cut crew. (Tr. p. 140) And per Mr. Miceli’s testimony, there are now thousands of cut backs each week needing to be saw cut by NYP. And the saw cutting crews can easily be mixed with members of both unions. It was done in the past and can easily be instituted again now that the work has been resurrected.

Clean Up: As for clean ups, Local 175 agrees with the majority of the testimony that each union should, (and historically did), clean up their own work. That is what has happened over the years and generally speaking

that is what happens now. (Tr. 49, 59, 80, 83, 84-88, 98-99, 129, 155, 239-240, 373, 374, 421, 480-481, 526, 528) Miceli claimed that nothing's changed regarding assignment of clean up work—that asphalt guys clean up the asphalt work and 1010 guys clean up the sidewalk work. That's it. (Tr. p. 592)

However, since April 1, 2017, Local 1010 members are being assigned the work of cleaning up after a paving crew is finished; and that is contrary to both past practice, the understanding of the workers and the Certifications. (See, Tr. P. 98-99, 304, 374, 675-676). It is Local 175's contention that clean up work related to asphalt milling and paving should be assigned to Local 175 members as it always was historically prior to April 1, 2017 in conformance with the general rule at NYP. It certainly appears to be more efficient and economical to have the men who were working at a location; and who have finished the job; pick up the barricades, cones and signs to return the road to a safe condition.

5. Merits of the Dispute—Factors to Consider in this Case:

a. **Board Certifications:** The Certifications do not specifically refer to “dig ups” or excavation; but it is certainly clear that work dealing with the laying of asphalt binder or temporary asphalt or finished asphalt jurisdictionally belongs to 175. And in regards to working with concrete the same would be true for 1010. The Certifications refer to the members of both unions having jurisdiction to perform landscape planting work; use

small equipment, (such as jackhammers, shovels and picks), in the performance of their work; and do work that is related to work on either asphalt or concrete; as the case may be. Here, the “dig up” relates to the removal of “cold patch” asphalt and the digging up of dirt (and remnants of concrete base caused by the cut back now required by the City). This discrete work primarily involves the removal of asphalt and dirt; and was work ALWAYS performed by 175 members for NYP in the streets of New York City, as opposed to work on sidewalks which involved concrete.

b. Collective Bargaining Agreements: Notwithstanding the two Unions’ Certifications, their respective collective bargaining agreements with NYP appear to overlap in many ways. Local 1010 claims its agreement allows its members to perform all paving work regardless of material used in the performance of road building. This transformation of jurisdiction took place contractually only after Local 175 had captured the asphalt paving jurisdiction in New York City by defeating LIUNA Local 1018 in numerous elections conducted at Region 29 in 2006 & 2007; so decimating Local 1018 to the point that LIUNA had to merge it into LIUNA Local 1010; which, in 2010, assumed the role of LIUNA’s asphalt paving Local. (See, Joint Exh. 1A, at page 8 and page 17-18 where reference is made in 1010’s agreement to Local 175 job classifications of screed person, raker & shoveler effective 7/1/11.)¹² Barton testified that Local 1018 was the

¹² Local 1010 uses this broadly worded contract with numerous employers, as described in Lowell Barton’s testimony, where 175 is not present; and 1010 members apparently perform asphalt paving work, including some “dig ups.” But

sister local to 1010; they shared the process of paving and road building. Local 1018 did most of the paving work but the two locals members worked together on paving projects; presumably where the laying of concrete was also involved. (Tr. P. 864) Although Counsel for 175 attempted to bring out that prior 1010 collective agreements did not include “excavation” as part of 1010 work, Mr. Barton indirectly acknowledged that fact when he testified that “Over the years, we’ve expanded and did more clarification to help our contractors in any disputes that may come out in the future.” (Tr. P. 755-756)

Notably, in regards to their claim to all asphalt restoration work, the provision in the 1010 contract specifically excludes site preparation and milling work. (Jt. Exh. 1, page 9, Article VI, Section 1c(ii)) “Dig Up” work is preparing the site, (the hole) for road restoration. “Dig Up” work was always given to and performed by 1018 previously; and subsequently by 175 pursuant to the contract and practice of NYP and 175.

Comparing the 1010 Agreement with the Local 175 Agreement, (Employer Exh. 2) it is clear that the 175 agreement covers “All Asphalt Paving work including but not limited to Site and Grounds Improvement, Utility, Paving and Road Building Work” which is defined as “(a) Prepare[ing] for and perform[ing] all types of asphalt paving, slurring including methacrylate and other similar materials and milling of streets

they do it at those firms in the absence of 175 members being employed; or the employers having a 175 agreement. NYP has a 175 collective agreement covering this work. Compare the 1010 Certification classifications with the 175 classifications which show screed person, raker and shoveler are 175 jobs.

and roads, and all other preparation work involved to prepare for resurfacing and to operate small power tools, operate all equipment necessary to install all types of resurfacing...including but not limited to digging trenches... ." (Emphasis supplied) (Employer Exh. 2, p. 9) As stated above, in order to return the road to its original status, the "cold patch" asphalt needs to be removed, (always been a 175 job) and the dirt (and concrete remnants) removed from the hole, (a job previously always performed by 1018 and 175 since its Certification victory over 1018 in 2007); in preparation for road base to be placed into the dug up hole, (previously all asphalt, now a mix of concrete and asphalt), all in preparation for finish paving of the road with Asphalt.

NYP, in its infinite wisdom, claims the "rule" is the work went to the union whose material was going into the hole. But there is no written rule supporting NYP's opinion, nor do the Certifications mandate such a rule; nor do the New York City regulations; but the contracts do show that 1010 was not to do "site preparation" when it came to asphalt paving; as site preparation for road restoration was certainly 175's work under the 175 agreement with NYP.

c. History of Who Performed the disputed work-Work Preservation:

Testimony from several workers, and even NYP management, made it abundantly clear that "dig ups," for the restoration of streets, in various forms, in driveways, and the Bronx and with various streets, during the

prior decades, had been solely performed by Local 175 members; or the predecessor asphalt paving union at NYP. Prior to April 1, 2017, no Local 1010 members had in fact performed dig ups in the street. (Tr. p. 504529, 533-536) Since April 1, 2017 all dig ups have been assigned to 1010 members. But the discrete work of removing the cold patch that covers the hole, and removal of what is under the cold patch, and the removal of whatever debris resulted from a cut back; is the same, identical work that was performed prior to April 1, 2017 by Local 175 members. And 175's grievance filed in arbitration was intended to assert its right to preserve its work.

In regard to saw cutting, going back to 2005 to approximately 2011-2012, saw cutting crews were split. (Tr. p. 195, 313-316, 595, 670) Because saw cutting of streets dried up, and saw cutting of sidewalks was 99% of that kind of work; Local 175 permitted the crew to be manned by only 1010 members. (Tr. p. 595) Now, with street cut backs mandated by a change in New York City rules, there are "a thousand dig ups a week" with the commensurate thousand cut backs requiring saw cutting; Local 175 believes the sharing of those saw cutting crews should be reinstated as indisputably existed in the past.

The clean up work was always distributed using the principle that clean ups were performed by the union whose crew was doing the work. That remains true today, for the most part; but for some reason NYP is permitting, and sending, 1010 clean up crews to clean up areas where

the finish asphalt paving crew has worked. And that contravenes history, the practice and the understanding of both unions.

d. Requisite Skills of the Competing Workers:

Both members of 175 and 1010 have the requisite skills to perform dig-ups. Thus, this criteria often looked to by the Board does not help decide this case. Members of both unions can and have used, jackhammers, swung picks and used shovels in performing dig ups. (Tr. p. 183, 516, 610) In regards to the operation of backhoes used in dig-ups 175 members operate them unconstrained by jurisdictional issues; but 1010 members are restricted from doing so due to Building & Construction Trades jurisdictional issues.

But there is a question of experience and safety associated with dig-ups. You have to be careful not to hit the “lines” with either the backhoe or a shovel, pick or axe. Notably, in this regard, only a 1010 crew actually struck and penetrated a gas main line. This occurred immediately after the dig-up work was assigned to 1010 members in early April, 2017, causing a huge problem and forcing National Grid, the Utility, to mandate that many holes be hand dug only, requiring more workers to be used on the “dig up” crews. (Tr. p. 309, 529, 685-686, 699) As a result NYP has internally held a lot of safety meetings. (Tr. p. 687)

In fairness, Local 175 workers acknowledged that in the past they too had struck unmarked service lines once in a while as they worked; but

never a main gas line. (Tr. p. 680-683, 688-689) But the inexperience of 1010 members in doing dig-up work, requiring NYP to train new people on the work; and National Grid's requiring more workers to be on the 1010 crew to hand dig, makes the economics of performing the work more expensive than using an experienced 175 "dig up" crew to safely perform the same work. (Tr. 620, 697)¹³ But as far as requisite skills to actually dig up the hole down 12 inches both unions workers have the skill, if they are careful, to perform the work. (Tr. P. 610, 903)¹⁴

e. Economy and Efficiency of Operations:

NYP asserts it is more efficient and economical for it to be able to assign 1010 crews to perform the "dig ups" because that crew could also be assigned the same day, at the same location to perform work on the sidewalk if necessary. NYP presented testimony that for a period of several weeks, on extraordinarily large sidewalk jobs, where on the same street there were dig ups to be performed that one 1010 concrete crew was assigned to do both the sidewalk restoration and the street restoration.

(Tr. p. 471-473, 477-479, 571) In the months since April, 2017 that was the

¹³ Miceli recognizes that his 1010 dig-up crews are not up to speed on doing dig-up work. He mused that he should have given dig-up work prior to April 1, 2017 to 1010 members and just assigned the placement of asphalt in the hole to 175. Interestingly, that is exactly what 175 says they now should do, but in reverse. Keep 175 doing the dig-ups, as they have done exclusively over the many years they have been performed; and give the concrete pour that goes into the hole to 1010 members. (Tr. p. 594)

¹⁴ Safety is a factor that can be considered by the Board when making decisions under 8(b)(4)(D). See, *Laborers Local 721 (H.H. Hawkins & Sons Co.)*, 288 NLRB 1246 (1988) See, Tr. p. 252, 253 where attempts to delve into safety issues were cut off by the hearing officer and opposing counsel as being irrelevant to this inquiry.

only crew testified about that had done such comprehensive work at 3 locations. (Tr. P 472-479) However, it is not contradicted that dig ups at those sidewalk locations could not be performed at the same time because you could not have the needed equipment on the street at the same time; (Tr. P.301, 586) and it was noted that the workers on the specific crew that did them was a uniquely large crew that would first perform their work on the sidewalk and then, if they had time, would dig up the cold patch and dirt of the nearby holes and leave the material dug up in the street to be picked up later. (Tr. p. 569, 587) Also, the concrete used on sidewalks is different from the concrete required to be poured into the hole or trench, (it's a different quick setting mix) which means the sidewalk crew's concrete could not be mixed and used to pour into a trench or hole; they would have to wait for different concrete to arrive; thus not be able to complete the process in an efficient manner. (Tr.p119-120, 366)

But most importantly, it is acknowledged that over 75% of the thousands of "dig ups" performed by NYP in EACH week are unrelated to sidewalk work; are performed on an individual basis. (Tr. p. 511, 611, 660) There is no claim of economy or efficiency of operations related to these individual dig outs that are unrelated to sidewalk or bus stop work.

Moreover, 175 dig up crews were made up of 3-4 workers; whereas 1010 dig up crews are often made up of 6 or more workers. (Tr. p. 184, 362, 506, Based on the contractual rates of pay for Laborers in the respective contracts it is obvious which crew is the more economical to

use. And it came out in the hearing that NYP is actually using workers employed by what appears to be an affiliated, non union firm, known as Di-Jo, on its 1010 dig up crews to train workers to perform “dig ups” because they don’t have enough 1010 workers to perform the work. (Tr. p. 506) Using non-union workers to perform union work is a clear violation of both unions’ collective agreements.¹⁵ Any claim of economy of operation by NYP is false as they use more men on the work.¹⁶ If there is an economy of operation it comes not from using 1010 members but from using cheaper Di-Jo workers to perform bargaining unit work.

f. Industry and Area Practice:

Lowell Barton, a Local 1010 officer and organizer, testified at length about Industry (Area) practice. He noted that he and others had gathered to think of all the firms that existed in New York City that did “excavation” work, noting that virtually all of them did excavation and road restoration work. The problem with his testimony is that it related mostly to deep

¹⁵ Di-Jo Construction Corp. has an address right next to NYP on Railroad Avenue. The name is an apparent amalgam of Diane Bartone Sarro and Joseph Bartone, both owners of NYP. Di-Jo pays its workers at rates far below contractual rates; and below prevailing wage rates for the work in question (\$20 per hour) training people to do 1010 work.

¹⁶ Miceli testified on October 2 that he was running 13-14 dig up crews. That means that about 42 Local 175 members would have been working had 175 been assigned the dig outs (3 to a crew). This represents a significant loss of work for 175 members in regards to work they always previously performed. Yet Miceli says he would be very surprised if 175 members lost hours. (Tr. p. 179) Compare that to Mr. Labate’s observation that before April 2017 there were 50 guys almost every day because the were doing dig outs; and that number was down after April to about 22 to 30 guys. (Tr. p. 97) So it would appear Mr. Miceli doesn’t know really what the effect is of his decision making on 175 members; or he does and it is just part of their mindset to rid NYP of 175 members. (See also, Tr. p 440--175 work diminished.)

excavations, not the kind of dig ups at issue in this case, and it related almost exclusively to firms that did not have Local 175 contracts. (Tr. p. 886-891) Barton, on his direct testimony, did not identify what he meant by a firm doing excavation work; and thus he confused the record by combining deep excavations not performed by NYP with excavations performed by firms replacing water, sewer mains and utilities digging down below 2 feet. (Tr. P. 881-882, 886-890, 898-900) Barton acknowledged that if a firm was just going to restore the road then it would just be doing a dig-up. He said: "If they were just going to restore, then they would just be doing a dig-up. If they were installing a pipe then they would dig it down deeper to put in the pipe." (Tr. P. 899) So Barton distinguished between doing a "dig up" and digging a deeper hole to perform some work other than restoration of the roadway.

Barton admitted that a Utility dig up is one that removes dirt, concrete and asphalt, primarily. (Tr. p. 881, 883) Barton admitted that dig ups had been done prior to 2004 (Tr. P. 884-885).¹⁷ Barton admitted that he would not expect to see 175 members doing dig ups for a company that did not have a contract with Local 175. (Tr. P. 906-907). When asked how many of the 30 odd firms he testified about as doing excavation and restoration did "dig ups" or the kind of work in contention here, he actually could only say

¹⁷ None of Barton's testimony about industry practice directly related to how NYP performed the work or to whom it gave excavation or restoration work. (Tr. 893)

“at least 10.” (Tr. P. 950) Only ten or so of those firms actually did the excavation and restoration in contention here. (Id.)¹⁸

Regarding the list of companies and why two firms, Nico Paving and Tri-Messine were not on his list; Barton was evasive, saying he did not know about them although both Nico (City Wide) & Tri-Messine (Callahan Paving) are subjects of Unfair Labor Practices, involving Local 1010 as an interested party, for having created alter egos and prematurely signed 1010 contracts; where both those firms prominently worked for Utility companies and performed “dig ups” using only 175 members prior to the creation of the alter ego. (Nico Asphalt Paving, and its alter ego, City Wide Paving, Inc., 29 CA 186692 and Tri-Messine Construction Co., and its alter ego, Callahan Paving Corp., 29 CA 194470) Barton claimed to know little about either firm; but knew their alter egos. (Tr. P. 803-804, 809, 925) and knew they did dig ups and restoration. His testimony was evasive because he did not want to admit that both Nico and Tri-Messine; historically for the last 10 or more years only had a 175 contract and performed dig ups using only 175 members for Utility companies. (See Tr. P. 908-927).¹⁹

¹⁸ Many of Barton’s observations as to what work was done by the 30 or so firms he testified about occurred years earlier and consisted mostly of “drive-by” observation and the occasional stop to look. (Tr. P. 937-944). And if a firm only had a few workers he would not even put them on the list, as in the case of Triumph. (Tr.p. 947)

¹⁹ Barton’s lack of candor about Nico Asphalt and Tri-Messine, both prominent companies in the utility paving business, both of which prematurely signed 1010 contracts, speaks volumes about the veracity of his testimony. After all, he is the Director of Organizing for 1010, and its Vice President.

It is submitted that Barton's testimony about "industry practice" adds nothing to the decision to be made in this case, as it does not relate to the facts where a firm has contracts with both Local 1010 and 175. Moreover, there is no testimony in the record that NYP performs excavations that go down six feet; or even two feet. (Tr. P. 886-887) Barton's testimony was not limited to dig-ups performed in regard to road restoration; and as NYP's counsel observed in regard to his testimony, he may or may not have truly sufficient knowledge to testify about a complete and utter irrelevancy. (Tr. P. 901)

g. Employer Preference:

NYP believes it is more cost effective and economical to give dig up work to Local 1010 members. Mr. Micelli believes it makes sense to him, that it's the best way; the quickest way. (Tr. P. 594) Micelli says its hard for him to plan for two (2) crews, the dig up/concrete crew; and the asphalt crew. (Tr. P. 632) But he did not mention any difficulties in assigning a mixed saw cut crew or the historic clean up crews who monitored each union's own work. As for it being hard to assign 175 members to perform a dig up; while placing two Local 1010 members on "the crew" to perform the concrete pour, Miceli really had no hard reason why he could not do that; especially when using a 175 dig up crew consisting of 2 workers, with an operating engineer and two 1010 workers to pour concrete, (as the crew moved separately along their appointed tasks), is more economical than using 6-7 Local 1010 members plus an operating engineer to perform

a dig up. And most of the dig up crews have nothing to do with sidewalks; and do not do sidewalk work on the same day or same location as when they would be doing dig ups. (Tr. p. 287, 367-368, 511-512, 569, 660) In fact, per Miceli, more than 75% of dig ups are done by individual dig up crews and have nothing to do with sidewalk, curb or bus stop concrete work. So where is the economy and efficiency with those crew assignments?


Conclusion

Based upon the evidence adduced at hearing it is submitted that the discrete function of "dig ups" related to the restoration of the road after the Utility is finished with its work and has backfilled the hole or trench should be awarded to Local 175 members because they performed the work throughout the past years, the work is covered by their Certification from the NLRB, they are very experienced with the work, have the skills to perform the work efficiently and economically. More than 75% of dig ups are performed unrelated to concrete sidewalk work, therefore as to those dig ups there is no efficiency of having a sidewalk crew perform those discrete dig ups.

Saw Cutting should be shared; saw cut crews should be mixed, as previously done; now that there is an abundance of that work available to NYP and all the workers. There can be no issue regarding work assignments as such crews, once formed, work independently, separate and at different times and locations, from the dig up crews, sidewalk

concrete crews and asphalt paving crews. Saw Cutting is a skill members of both Unions have and can perform, and the function is within the ambit of both union certifications (small equipment operators). Historically the work was shared as saw cutting involved the cutting of both asphalt and concrete; regardless of the depth of each material.

Clean up work in the normal course is not in dispute. The testimony shows that clean up work is the responsibility of each union's crews. Sidewalk crews clean up their work when finished; and asphalt crews do the same. That has been the practice and understanding of the parties. Why some clean up of asphalt paving locations has been separately assigned to Local 1010 members after April 1, 2017 was not explained, nor is it justified. It would be just as easy to assign a 175 member to clean up an asphalt paving location, if the paving crew itself could not do it, as it is to assign a 1010 member to do it. In fact, a 175 clean up crew exists for just that circumstance. (Tr. p. 80-81, 83-87)

Respectfully submitted,

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Affidavit of Service

The undersigned certifies that on December 8, 2017 he served the Brief of Local 175, the interested party identified in the attached Brief submitted to the National Labor Relations Board in Case No. 29-CD-203385 upon:

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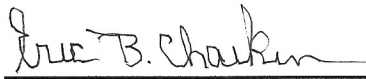
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